No: 438

In The

Supreme Court of the United States

October Term, 1950

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LANSING, AL FUHRMAN,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ~~THE UNITED STATES~~ Wisconsin

Brief of Respondent

THOMAS E. FAIRCHILD
Attorney General

STEWART G. HONECK
Deputy Attorney General

MALCOLM L. RILEY
Assistant Attorney General

Attorneys for Respondent

THE GILMAN PRESS, MADISON, WISCONSIN

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OPINIONS BELOW

The opinion of the Circuit Court of Milwaukee County (R.) is unreported. The opinion of the Wisconsin Supreme Court of which a copy is printed as Appendix B at page 16 of the brief of petitioner for the writ herein, is reported in 258 Wis. 1, N. W. 2nd .

JURISDICTION

The mandate of the Supreme Court of Wisconsin, affirming the Circuit Court of Milwaukee County, was entered on November 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

1. Is the judgment in *United G., C. and C. Workers v. Wis. E. R. Board,* (1949) 255 Wis. 154, 38 N. W. 2d 692, *res judicata* and a bar to further determination of the constitutional issues in this action.

2. May a state in the exercise of its police power compel arbitration when collective bargaining reaches an impasse or stalemate and forbid a strike in a labor dispute between a union and a public utility where

(1) The utility operations are local in character and do not involve the "national health or safety" so as to invoke the "emergency provisions of the Labor Management Relations Act 1947, 61 Stats. 155-156, 29 U. S. C., Supp. 3 §176-180 and where

(2) A court of competent jurisdiction has found in proceedings under the statute that a work stoppage by the union in the supply of such essential public utility service will create an emergency resulting in irreparable injury to the citizens of such state.

WISCONSIN STATUTES INVOLVED

The pertinent State statutes are Subchapter III of Chapter 111, being secs. 111.50 to 111.65, Wisconsin Statutes and Wisconsin Statutes section 269.56, providing for declaratory judgment, subsecs. 1, 2, 11 and 12, are printed in the Appendix to state official Appellee's brief in Case No. 302.

FEDERAL STATUTE INVOLVED

The federal statute involved is the Labor Management Relations Act, 1947, copies of which we are advised will be provided the court by counsel for the National Labor Relations Board.

STATEMENT

Prior to October 5, 1949, the membership of the petitioner United Gas, Coke and Chemical Workers of America, Dist. 7, Local 18, CIO (hereinafter called the "union") had authorized the negotiating committee of the union to call a strike against the Milwaukee Gas Light Company (hereinafter called the "company" or "employer",) and on October 4, 1949, the committee, consisting of Arthur St. John, Thomas Lansing and Al Fuhrman, ordered the strike to commence at 6:00 A. M., October 5, 1949. At 11:00 o'clock A. M. the public was advised to curtail consumption of gas (R. 5) and an appeal to the consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could

be done with the main pumping facilities; the fire had to be pulled from the boiler, reducing the steam pressure and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that air would not get into the mains, so as to prevent any explosion due to the mixture of gas and air in the distribution system; the send-outs dropped to 25% of what they had been previously (R. 6). Low pressure in the system created a dangerous condition wrought with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and shut off the service at the meter. The service was not resumed until October 6, 1949.

Upon application of the Wisconsin Employment Relations Board (hereinafter referred to as "board"), the lower court entered a restraining order at 12:55 P. M. on October 5, 1949 (R. 6), requiring the petitioner to show cause on October 7, 1949, why temporary relief asked by the board should not be granted and directing the petitioners and Walczak, pending the hearing, "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slow down which would cause an interruption of the services of the Milwaukee Gas Light Company" and to restrain them from instigating a work stoppage by picketing or otherwise that would interrupt the service of the company (R. 14-15).

The restraining order was served by the deputy sheriff on the union by serving its president, Arthur St. John and upon him personally and upon Chester Walczak, International Representative at a meeting of a large group of the members of the union at Bohemian Hall at about 2:00 P. M. on November 5. Thomas Lansing (R. 58-59) and Alvin

C. Fuhrman had notice of the restraining order (R. 53). Chester Walczak and Arthur St. John told the men the paper served was an order to go back to work, but no statement was made calling the men back to work (R. 6).

A picket line was maintained at the premises of the Coke Company from 2 or 3:00 P. M. and continued there throughout the evening of October 5, 1949.

The Coke Company is a wholly owned subsidiary of the Gas Company. In October 1949 the Coke Company supplied about 55 to 60% of the gas distributed by the Gas Company. Because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility employer and the public utility anti-strike law applies to it (R. 7). The present proceeding does not relate back to the action of the union voting the strike or the act of the negotiating committee calling the strike. It relates to matters occurring subsequent to the signing of the order and the service of same at about 2:00 P. M. on October 5 (R. 7). The order required the union, St. John, Walczak and Lansing to take immediate steps to notify all employes called out on strike to resume service forthwith; because of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public, the order required immediate compliance (R. 7).

On Arthur St. John, president of the union, a member of the executive board and of the negotiating committee, on Thomas Lansing, a member of the executive board of the negotiating committee and on Alvin C. Fuhrman, vice-president of the union and a member of the executive board of the negotiating committee was placed the responsibility by vote of the union to call the strike and upon them rested

the responsibility after the service of the restraining order to revoke the call to comply with the order of the court. The language of the court order is direct and unambiguous: It demanded something to be done. "Take immediate steps to notify all employes called out on strike to resume service forthwith" (R. 7). The petitioners' union and Arthur St. John, Thomas Lansing and Alvin C. Fuhrman were proceeded against and convicted of contempt in violating the order of the court. Chester Walczak and thirteen other persons were found not guilty of contempt of violation of October 5, 1949 order (R. 14).

As appears from the record in Case 302, pages 79 and 80, by way of stipulation, which stipulation was before the trial court below in this case the petitioners herein to-wit: the union and Thomas Lansing, by amended complaint dated October 13, 1948, commenced an action in the Circuit Court for Milwaukee County, Wisconsin, as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company praying the court to determine and declare the rights of the parties and to declare Subchapter III of Chapter 111 of the Wisconsin Statutes 1947 unconstitutional and invalid and to give such further relief by way of declaration of the rights of the party as might be lawful, just and proper.

Defendants in the Declaratory Judgment Action interposed a general demurrer and after trial of the action upon issues raised by the demurrers, judgment was entered determining the Wisconsin Statute to be valid. The judgment provided:

> "'It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid

and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947 [29 U. S. C. A. §141 et seq.], and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, * * */any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.'"

The judgment of the Circuit Court was appealed to the Supreme Court of Wisconsin (R. 4). *United G., C. and C. Workers v. Wis. E. R. Board*, (1949) 255 Wis. 154, 38 N. W. 2d 692. There the judgment of the Circuit Court was affirmed. No appeal was taken from the Wisconsin Supreme Court to the United States Supreme Court.

In the case at bar, arising from the same employment relationship, the lower court held that the judgment in the Declaratory Judgment Action involved the same parties and the same issues and was for the same purpose as the proceedings in the case at bar and that the constitutional issues were considered in the former case and decided therein adversely to petitioners and concluded that the judgment in the earlier action is a final and conclusive adjudication and *res judicata* upon the question of the validity of Subch. III of Ch. 111 of the Wisconsin Statutes and precludes the petitioners from raising the same issues in the present proceedings (R. 4).

The lower court thereupon entered its findings of fact and conclusions of law and adjudged the petitioners guilty of contempt in violating the order of the court of October 5, 1949. Appeal was taken to the Wisconsin Supreme Court and the judgment of the Circuit Court was affirmed on November 8, 1950; with respect to the constitutional question, the Wisconsin Supreme Court cited its prior holding, *United G., C. and C. Workers v. Wis. E. R. Board,* (1949) 255 Wis. 154, 38 N. W. 2d 692, which was held by the lower court to be *res judicata* (R.) to petitioners' attempts to raise the constitutional issues.

ARGUMENT

I.

THE STATE COURT JUDGMENT IN *UNITED GAS, COKE AND CHEMICAL WORKERS v. WISCONSIN EMPLOYMENT RELATIONS BOARD* (1949) 255 WIS. 154, 38 N. W. 2d 692, IS *RES JUDICATA* AS TO ISSUES SOUGHT TO BE RAISED ON THIS APPEAL.

This section of our argument is printed commencing at page 5 in our brief filed in No. 302 and is not reprinted here.

II.

THE EXERCISE BY THE STATE OF ITS POLICE POWER TO PROTECT ITS CITIZENS IN AN EMERGENCY SITUATION FROM IRREPARABLE INJURY IS NOT REPUGNANT TO FEDERAL LAW OR CONSTITUTION.

Our argument in support of this proposition is presented in our brief in case No. 329 and 330, commencing at page 7.

III.

THE NO-STRIKE AND COMPULSORY ARBITRATION PROVISIONS OF THE WISCONSIN ACT ARE NOT INCONSISTENT WITH THE SCHEME ADOPTED BY CONGRESS FOR REGULATING COLLECTIVE BARGAINING AND STRIKES.

The regulation of the collective bargaining process claimed on behalf of the National Labor Relations Board, at page 32 of its brief is not applicable to the case at bar. When private negotiations have reached an impasse or stalemate, there is no duty on the part of a disputant to bargain collectively. The duty to bargain has several limitations. Teller, vol. 2, sec. 327, p. 880. One of these is that the duty to bargain ceases when the negotiations have reached a stalemate. *National Labor Relations Board v. Sands Mfg. Co.*, 96 Fed. 2d 721, affirmed by 306 U. S. 332, 59 S. Ct. 508, 83 L. ed. 682*. Accordingly, where there is no duty to bargain, no unfair labor practice can arise from a refusal to bargain. Where there is no unfair labor practice, the federal board does not provide a remedy.

It is asserted by the state board, since the Wisconsin statute is applicable only where collective bargaining has reached an impasse, or stalemate, that no conflict between federal and state acts can arise.

The state power may operate certainly where the federal board is not able to act.

CONCLUSION

Respondent respectfully prays that the judgment of the lower court be affirmed.

Respectfully submitted,

THOMAS E. FAIRCHILD
Attorney General

STEWART G. HONECK
Deputy Attorney General

MALCOLM L. RILEY
Assistant Attorney General

Attorneys for Respondent